

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
BELLMAWR, NJ, Employer**

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**Docket No. 16-0409  
Issued: April 7, 2017**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 29, 2015 appellant, through counsel, filed a timely appeal from a July 30, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence following the July 30, 2015 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

## **ISSUE**

The issue is whether appellant established a permanent impairment of his left upper extremity causally related to his July 14, 2007 employment injury for schedule award purposes.

## **FACTUAL HISTORY**

On July 15, 2007 appellant, then a 41-year-old flat sorter machine (FSM) clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 14, 2007 he experienced pain in his lower back and shoulders when he moved an automated postal center cage that was full of mail. He did not stop work. OWCP accepted appellant's claim for lumbar sprain, lumbosacral sprain, left shoulder and upper arm sprain, and acromioclavicular (AC) joint sprain. Appellant worked limited-duty following this injury.

This case was previously before the Board.<sup>4</sup> In a decision dated June 7, 2010, the Board affirmed the October 24, 2008 and May 7, 2009 OWCP decisions which found that appellant failed to establish that he sustained a recurrence of disability beginning November 10, 2007 causally related to his July 14, 2007 employment injury. The record reflects that he retired in June 2008. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.

On July 3, 2012 appellant, through counsel, submitted a claim for a schedule award (Form CA-7).

Appellant submitted an August 24, 2012 impairment evaluation report by Dr. Karen Garvey, a Board-certified internist, who noted accepted conditions of lumbar sprain, lumbosacral joint sprain, left shoulder and upper arm sprain, and left AC joint sprain. Dr. Garvey reviewed his history and recounted that he had a history of arthritis flare and pain in his joints since late 2000s. She related that appellant worked as a mail distribution clerk and that in July 2007 he injured his back and left shoulder when he was putting mail on top of the mail cage at work. Dr. Garvey described the medical treatment he received and indicated that despite his treatment his pain persisted which led to him retiring due to disability on June 17, 2008. She opined that based on her review of appellant's medical history and the information provided by him, he reached maximum medical improvement (MMI) for his left shoulder on March 26, 2009 and for his lumbar spine on June 6, 2010.

Upon examination of appellant's lumbar spine, Dr. Garvey observed tenderness to palpation in the cervical region and mild tenderness to palpation in the lumbar region. She noted no tenderness to palpation in the thoracic spine. Dr. Garvey reported that appellant was able to flex the lumbar spine forward to 90 degrees and extend to 30 degrees. Examination of the left shoulder revealed no swelling or erythema and no tenderness to palpation. Dr. Garvey also revealed a well-healed small incision on the shoulder. She also indicated that range of motion

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<sup>4</sup> Docket No. 09-1752 (issued June 7, 2010).

(ROM) of appellant's left shoulder showed mild decreased ROM and provided ROM findings.<sup>5</sup> Sensation to pinprick and light touch was equal bilaterally in the upper and lower extremities. Dr. Garvey reported that appellant sustained a work-related injury to his back and left shoulder on July 17, 2007 and also had preexisting psoriatic arthritis since 2000. She explained that, due to the multiple areas of pain symptoms and the progressive nature of his arthritis unrelated to his work injury, she determined that his responses to both the Pain Disability Questionnaire (PDQ) and *QuickDASH*<sup>6</sup> questionnaires were unreliable. Dr. Garvey opined that appellant's responses to the questionnaires related to his current pain, which she attributed to his underlying disease, and not his work-related injury. She noted that her objective assessment revealed that he had minimal to no symptoms. Dr. Garvey concluded that appellant's current pain was related to his "underlying arthritic condition involving the cervical spine, right shoulder, right hip, and left ankle."

Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Garvey determined that appellant had zero percent permanent impairment related to the accepted lumbar and lumbosacral sprains. She explained that he was able to flex forward to 90 degrees and extend his back to 30 degrees without difficulty. Dr. Garvey also noted that there were no peripheral nerve impairments identified for either the right or left lower extremities related to appellant's spinal nerve. Accordingly, she concluded that he did not have any permanent impairment for his accepted lumbar condition. Regarding appellant's left shoulder sprain, Dr. Garvey explained that according to sections 15.2 and 15.3b in Chapter 15 ROM deficits may be used when the diagnosis-based impairment (DBI) grids referred to ROM as the most appropriate mechanism. She referenced Table 15.34 for rating appellant's impairment due to ROM deficits and applied his ROM findings on examination.<sup>7</sup> Dr. Garvey determined that he had 11 percent impairment of the left upper extremity due to the accepted left shoulder sprain. Regarding appellant's left shoulder AC joint strain, she referenced Table 15-5 and noted a default value of C. Applying grade modifiers and the net adjustment formula, Dr. Garvey calculated that he had two percent impairment.<sup>8</sup> She combined appellant's impairment for left shoulder sprain and AC joint sprain for a total of 13 percent permanent impairment to his left shoulder.

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<sup>5</sup> Dr. Garvey reported ROM of abduction to 160 degrees, adduction to 30 degrees, flexion to 155 degrees, extension to 55 degrees, internal rotation at 90 degrees to 45 degrees, and external rotation at 90 degrees to 80 degrees.

<sup>6</sup> Dr. Garvey provided appellant's completed PDQ questionnaire, which demonstrated a score of 115, and a completed *QuickDASH* questionnaire, which demonstrated a score of 85.

<sup>7</sup> Dr. Garvey calculated that: abduction of 160 degrees, with grade modifier of 1, resulted in three percent impairment; adduction of 30 degrees, with grade modifier of 1, resulted in one percent impairment; flexion of 155 degrees, with grade modifier of 1 resulted in 3 percent impairment; extension of 55 degrees, with grade modifier of 0, resulted in 0 percent impairment; internal rotation at 90 degrees of 45 degrees, with grade modifier of 2, resulted in four percent impairment; external rotation at 90 degrees of 80 degrees, with grade modifier of 0, resulted in 0 percent impairment. She combined all the impairment percentages for a total of 11 percent permanent impairment.

<sup>8</sup> Dr. Garvey reported grade modifiers of 0 for functional history, 1 for diagnosis, and 1 for clinical studies for a total net adjustment of -1.

OWCP referred appellant, along with the statement of accepted facts (SOAF) and Dr. Garvey's August 24, 2012 impairment rating, to Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and OWCP medical adviser, in order to determine whether appellant sustained a permanent impairment to the left upper extremity. In an August 18, 2013 report, Dr. Magliato recounted that OWCP accepted appellant's claim for sprain of the lumbar spine and lumbosacral joint and sprain of the left shoulder, upper arm, and AC joint. He noted that he reviewed appellant's records, including Dr. Garvey's August 24, 2012 impairment rating, and agreed with her findings that appellant had 11 percent permanent impairment of the left upper extremity based on ROM deficits due to his accepted left shoulder sprain. Dr. Magliato disagreed, however, with her additional two percent permanent impairment rating due to appellant's left shoulder AC joint sprain. He explained that the ROM method was a stand-alone method and was not to be combined with any DBI methods using the shoulder grid. Dr. Magliato reported that appellant reached MMI for his left shoulder on August 24, 2012.

By letter dated October 16, 2013, OWCP requested that Dr. Garvey review Dr. Magliato's August 18, 2013 report and submit an addendum addressing why she combined the ROM stand-alone method with any DBI related method when determining impairment for appellant's left shoulder. No response was received.

In a decision dated December 6, 2013, OWCP denied appellant's claim for a schedule award. It pointed out that Dr. Garvey did not respond to OWCP's October 16, 2013 letter and determined that the medical evidence on the record failed to establish that he sustained a permanent impairment to his left upper extremity as a result of his July 17, 2007 employment injury.

On December 24, 2013 OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP hearing representative. On June 10, 2014 a telephone hearing was held before the Branch of Hearings and Review hearing representative. Appellant stated that he did not have any injuries to his shoulder after the July 14, 2007 employment injury, but he did experience a prior nonwork-related left shoulder injury and surgery for a partial rotator cuff tear in 2002. He reported that in May 2008 he returned to full duty, but only worked for one week because he still experienced symptoms such as shoulder and neck pain. Appellant indicated that he retired due to disability in June 2008. Counsel referred to Dr. Garvey's impairment rating and pointed out that she provided detailed objective findings and explanation for why appellant had 13 percent impairment of the left shoulder extremity according to the sixth edition of the A.M.A., *Guides*. He alleged that the law gave the physician, not the hearing representative, the authority to determine impairment rating according to the sixth edition of the A.M.A., *Guides*. Counsel further asserted that OWCP failed to follow proper procedure when it did not give a copy of the medical adviser's report to appellant or himself and when it denied appellant's schedule award claim based on the fact that Dr. Garvey did not reply to OWCP's October 16, 2013 letter. He requested that OWCP vacate the December 6, 2013 denial decision and refer appellant's case for a second opinion examination.

In a letter dated June 21, 2014, appellant informed OWCP that he found only one legible report regarding his left shoulder surgery in 2002. He stated that he also found some old reports regarding a work injury in 1999. Appellant submitted a traumatic injury claim form (Form

CA-1) dated September 15, 1999 regarding a right foot and arm injury and various reports from 1999 regarding treatment for an injury to his right big toe and right arm.

Appellant provided a medical report regarding treatment for his left shoulder in 2002. In a January 16, 2002 magnetic resonance imaging scan of the left shoulder, Dr. Ravindra V. Ginde, a Board-certified diagnostic radiologist, reported intermediate increased signal with thickening supraspinatus tendon consistent with partial tear.

By decision dated July 29, 2014, an OWCP hearing representative set aside the December 6, 2013 denial decision. She determined that neither Dr. Garvey nor Dr. Magliato explained how appellant's July 14, 2007 work injury continued to cause residuals of the accepted condition, or lead to any permanent impairment. The hearing representative remanded the case for OWCP to refer appellant, along with a more comprehensive SOAF,<sup>9</sup> to a second opinion examiner, to determine whether appellant continued to suffer residuals of his left shoulder injury and if so, whether he had permanent impairment of the left upper extremity in accordance with the sixth edition of the A.M.A., *Guides*.

OWCP referred appellant's claim, along with an updated SOAF and a position description for a FSM operator, to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion examination. The updated SOAF included a description of the July 14, 2007 employment injury and his duties as a FSM clerk. It also indicated that along with appellant's accepted conditions he also suffered from preexisting hypertension, psoriatic arthritis, and a nonwork-related left shoulder rotator cuff injury. Dr. Lakin was asked to examine appellant in order to determine whether he continued to suffer residuals of his July 14, 2007 employment injury and if so, whether he had any permanent impairment of the left upper extremity pursuant to the sixth edition of the A.M.A., *Guides*.

In an August 26, 2014 report, Dr. Lakin accurately described the July 14, 2007 employment injury and the medical treatment he received. He reviewed appellant's records and noted a history of psoriatic arthritis and left and right shoulder surgeries. Upon examination of appellant's cervical spine, Dr. Lakin observed no tenderness and full active ROM. He also reported no tenderness of the thoracic and lumbosacral spine and provided ROM findings. Examination of appellant's left shoulder further revealed full and symmetric ROM with no tenderness in the glenohumeral joint, anterior subacromial space, the AC joint, and the sternoclavicular joint. Impingement and drop arm tests were negative. Spurling's and Hoffman's signs were also negative.

Dr. Lakin opined that appellant did not suffer any residuals of the left shoulder or upper arm or AC joint sprains from the July 14, 2007 work injury. Utilizing the sixth edition of the A.M.A., *Guides*, he indicated that, because appellant had no objective findings of his work-related injury, there was no permanent impairment of the left upper extremity or lumbar spine because all classes were zero. Dr. Lakin explained that appellant had excellent strength, ROM, and no objective findings on examination, including tenderness. He specifically referenced Table 16-2 for peripheral nerve impairment to the extremities and noted no objective findings,

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<sup>9</sup> The hearing representative specifically noted that the SOAF should include a description of the mechanism of injury regarding the July 14, 2007 employment injury and a list of appellant's concurrent and preexisting conditions.

which correlated with class zero impairment. Dr. Lakin also relied on Table 15-5 for appellant's left shoulder AC joint and shoulder sprain and indicated a class zero impairment. He reported a date of MMI of August 26, 2014.

OWCP referred appellant's claim back to Dr. Magliato, OWCP's medical adviser, in order to address whether appellant sustained any permanent impairment to the left upper extremity as a result of his July 14, 2007 work injury. In a September 9, 2014 report, Dr. Magliato noted that appellant's accepted conditions of sprain of the upper back, sprain of the lumbosacral joint, sprain of the left upper arm, and sprain of the left shoulder and left AC joint. He related that he reviewed Dr. Garvey's August 24, 2012 report, which indicated that appellant had 13 percent permanent impairment, and Dr. Lakin's August 26, 2014 report, which noted no permanent impairment. Dr. Magliato indicated that Dr. Lakin found a normal examination in the left upper extremity and opined that appellant was a class 0 in all the impairment tables. He agreed with Dr. Lakin's finding that appellant had zero percent permanent impairment of the left upper extremity according to the sixth edition of the A.M.A., *Guides*.

By decision dated November 21, 2014, OWCP denied appellant's schedule award claim finding that he had not sustained a measurable permanent impairment of the left upper extremity due to his July 24, 2007 employment injury. It determined that the weight of medical evidence rested with Dr. Lakin's August 26, 2014 report, which found that appellant did not suffer any residuals of his employment injury and therefore he had no permanent impairment of the left upper extremity.

On December 9, 2014 OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP Branch of Hearings and Review hearing representative. On May 20, 2015 a telephone hearing was held. Counsel alleged that Dr. Garvey's report was the report most compatible with the A.M.A., *Guides*. He also noted that the A.M.A., *Guides* required that the method yielding the highest impairment be utilized for calculation of impairment. Counsel further asserted that a conflict in medical evidence existed between Dr. Garvey and Dr. Lakin regarding appellant's impairment and appellant's claim should be referred for an impartial medical examination.

In a decision dated July 30, 2015, OWCP's hearing representative affirmed the November 21, 2014 decision denying appellant's schedule award claim. The hearing representative concluded that Dr. Lakin's report constituted the weight of the medical evidence.

### **LEGAL PRECEDENT**

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.<sup>10</sup> Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.<sup>11</sup> FECA, however, does not

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<sup>10</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>11</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>12</sup>

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*.” The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>13</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>14</sup>

### ANALYSIS

The issue on appeal is whether appellant established a permanent impairment of his left upper extremity causally related to his July 14, 2007 employment injury, for schedule award purposes.

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>15</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>16</sup> In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of

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<sup>12</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>14</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>15</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>16</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.<sup>17</sup>

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the July 30, 2015 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

### **CONCLUSION**

The Board finds this case not in posture for decision.

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<sup>17</sup> *Supra* note 15.



**ORDER**

**IT IS HEREBY ORDERED THAT** the July 30, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 7, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board